

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

UTILITY LINES CONSTRUCTION
SERVICES, INC.

Employer

and

Case 5-RC-15561

LOCAL 126, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

Petitioner

HEARING OFFICER'S REPORT ON OBJECTIONS

APPEARANCES

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BEFORE:

Andrew J. Krafts, Hearing Officer
National Labor Relations Board, Region 5
103 South Gay Street, 7th Floor Hearing Room
Baltimore, MD 21202

I. PROCEDURAL BACKGROUND

On April 10, 2003,¹ Local 126, International Brotherhood of Electrical Workers, AFL-CIO (Petitioner or Union), filed the petition seeking certification as the exclusive representative of a unit of employees employed by Utility Lines Construction Services, Inc. (Employer or Company). Pursuant to a Decision and Direction of Election² issued by the Regional Director on May 5, a secret-ballot election was conducted on June 4, and on June 6 the Tally of Ballots issued with the following results:

Approximate number of eligible voters	79
Void ballots	0
Votes cast for Petitioner	44
Votes cast against participating labor organizations	26
Valid votes counted	70
Challenged ballots	1
Valid votes counted plus challenged ballots	71

The single challenged ballot did not affect the results of the election. On June 13, the Employer timely filed two objections to conduct affecting the results of the election.³ The Regional Director issued a Supplemental Decision and Notice of Hearing in this matter on June 26, in which he ordered that a hearing be conducted before a duly designated hearing officer for

¹ All dates are in the year 2003 unless noted otherwise.

² The unit is: "All full-time and regular part-time employees performing electrical construction work for Utility Lines Construction Services, Inc., at and out of its Milton, Delaware location, including crew foreman, linemen, apprentices, equipment operators, groundsmen and mechanics, excluding all clerical employees, professional employees, confidential employees, guards, and supervisors as defined by the Act."

³ I will consider on their merits only that alleged conduct and interference that occurred during the critical period, which begins on and includes the date of the filing of the petition and extends through the election. Goodyear Tire and Rubber Company, 138 NLRB 453 (1962).

the purpose of receiving testimony to resolve the issues of fact and credibility raised by the Employer's objections.

Accordingly, a Hearing was held before the undersigned on July 9. At the Hearing, all parties were afforded a full and complete opportunity to be heard, to examine and cross-examine witnesses, and to present evidence pertinent to the issues presented by the objections. On the basis of my observations of the witnesses while testifying under oath, and the record in its entirety, including the exhibits and the parties' closing arguments, I make the findings of fact, resolutions of credibility and recommendations set forth herein. In resolving credibility issues, I have taken into consideration such factors as the relative demeanor of the witnesses, partisan interest, guarded or indirect answers, conclusionary and conflicting testimony, argumentativeness, ability to recall with accuracy and specificity, consistency, corroboration, and inherent probabilities and reasonable inferences in view of the record as a whole. See Bishop & Maco, Inc., 159 NLRB 1161 (1966). Based on my review and analysis, for the reasons detailed in this report, I am recommending that the Board sustain the Employer's Objection 1 and direct a second election.

II. THE OBJECTIONS

1. Within the twenty-four hour period immediately preceding the opening of the polls for the subject election, and continuing through and during the election, the Petitioner, through its officers and agents, continuously used an electrically amplified bullhorn adjacent to the employee parking lot entrance immediately next to the Employer's building in which the election was being conducted, which parking entrance was used by voters coming into the Employer's facility to vote, repeatedly urging voters to vote for Petitioner. This repeated amplified message was broadcast at such a volume as unavoidably to be heard by groups of voters entering and in the facility to vote, before and during paid time, and was augmented by agents of Petitioner shouting the same message to voters entering the facility from the same site as user of the bullhorn.

Statement of reasons in support of objection: The above conduct destroys the laboratory conditions required for holding a fair secret ballot election.

2. Within the twenty four hour period immediately preceding the opening of the polls for the subject election, the Petitioner, through its officers and agents, visited groups of voters on working time on the Employer's job sites and engaged in pro-union electioneering meetings and talks, urging employees to vote for the Union in the next day's Board conducted secret ballot election.

Statement of reasons in support of its objection: By the above conduct, the Union engaged in conduct prohibited by the Board's Peerless Plywood rule and destroyed the laboratory conditions required for conduct of a secret ballot election.

III. FACTUAL FINDINGS

A. The Alleged Pre-election Union Meetings

The Employer alleges in Objection 2 that on June 3 the Petitioner held two pro-union electioneering meetings with eligible voters within 24 hours of the election. Specifically, the Employer claims that one of these meetings occurred at a jobsite in Pearson's Corner, Delaware and that the second meeting occurred at a jobsite in Rehobeth Beach, Delaware.

With respect to the Pearson's Corner jobsite, there is an immediate dispute as to whether any union representative actually visited the jobsite on June 3. According to General Foreman Jeffrey Hunter, he had a crew pulling electrical wire at the site on June 3. Tim Taylor was the crew foreman. The crew included employees Ronnie Wyrick, David Pruitt, and Kevin Bullock. Hunter testified that on June 3 he visited the jobsite at about 2:30 p.m., which according to Hunter was working time.⁴ Hunter testified that, as he arrived at the site on June 3, he saw a union representative standing next to a pickup truck talking to several crewmembers sitting in the truck. Initially, Hunter testified that Organizer Fridell was that union representative. On cross-examination, however, Hunter admitted that he was mistaken on this point, agreeing that he did not see Organizer Fridell at the Pearson's Corner jobsite. Hunter testified then that it was

⁴ Hunter testified that Crew Foreman Taylor told him that the crew had already taken lunch that day at about 12 p.m. Hunter agreed, though, that when employees are pulling wire their lunchtime sometimes varies, depending on the progress of the work.

actually Union Organizer Richard I. Muttik he saw talking to employees at the jobsite on June 3. Hunter testified that he was sure he saw Muttik on June 3 because that was the same day he, Hunter, had to drive from Delaware to his home in North Carolina to attend to some unspecified problems. In any case, Hunter testified that, as soon as he arrived, Organizer Muttik began to walk away from the pickup truck, that Muttik said hello to him, and that Muttik then left the site. Hunter testified that he then asked Crew Foreman Taylor what the meeting was about. According to Hunter, Taylor just said, "union meeting." Hunter also testified that, about a week later, he asked crewmember Bullock what the alleged June 3 meeting was about. According to Hunter, Bullock said only that it was a "meeting," which Hunter assumed meant "union meeting."⁵

Organizer Muttik appeared equally sure that he was not at the Pearson's Corner jobsite on June 3. Muttik readily admitted that he had visited the Pearson's Corner jobsite during the campaign, but he testified that the last time he visited the jobsite prior to the election was just before Memorial Day, which fell on May 26. On cross-examination, Muttik conceded that he could not recall the precise date of his last visit to the Pearson's Corner jobsite, but he remained firm that it was not June 3. In all other respects, Muttik's testimony was largely consistent with General Foreman Hunter's testimony. Muttik testified that, on the last day he visited the site, he arrived in the afternoon and approached several crewmembers after he observed them leave their work areas and enter a pickup truck. Contrary to Hunter's testimony, though, Muttik testified

⁵ Counsel for the Petitioner objected to the receipt of Taylor's and Bullock's responses to Hunter's inquiries on the ground that each response constituted hearsay, insofar as the Employer was seeking to establish that Organizer Muttik in fact held a union meeting with the crewmembers on June 3. I permitted the testimony in order to complete the record of the conversations, but I advised the parties that, insofar as Taylor's and Bullock's responses were being offered to prove the truth of the matters asserted, the responses appeared to constitute hearsay, and I so find.

that the crewmembers in the truck told him they were going for lunch because they had not eaten yet. In any case, Muttik testified that he told them that, when they came back, he would be "over there talking to Dennis Bush and Kevin Bullock." Muttik added that he then spoke with Bush and Bullock while they were eating their lunch.

The only other witness to testify about Organizer Muttik's alleged June 3 visit to the Pearson's Corner jobsite was employee Kevin Bullock. Bullock testified that neither Organizer Fridell nor Organizer Muttik visited the jobsite on June 3. Bullock conceded that, about a week after the election, General Foreman Hunter asked him about Muttik visiting the jobsite and that he, Bullock, told Hunter he thought Muttik had visited the site the day before the election. Bullock further testified, however, that, within a day of his conversation with Hunter, he concluded that Muttik's last visit to the Pearson's Corner jobsite occurred the week before the election, and that he spoke to Hunter about this. Bullock explained that a certain unnamed employee was absent the day Muttik visited the jobsite and that he, Bullock, remembered this employee being at the site the day before the election. Thus, Bullock testified that Muttik's visit could not have occurred on June 3.

Considering all of the above, I find that Organizer Muttik did not visit the Pearson's Corner jobsite on June 3. Specifically, I credit Muttik's testimony that he did not go to the jobsite on June 3 and that his last visit to the jobsite occurred just prior to Memorial Day. Most important, I was impressed with Muttik as a witness. On both direct and cross-examination he gave direct answers to the questions put to him, and he appeared to be sincerely canvassing his memory of the events. Indeed, I would credit Muttik's testimony for these reasons alone.

Also, though, I find it significant that certain of the Employer's own testimonial and documentary evidence tends to support Muttik's claim that his last visit to the jobsite did not

occur on June 3. As described above, General Foreman Hunter testified that, on June 3, the crew at the Pearson's Corner jobsite consisted of Crew Foreman Taylor and employees Wyrick, Pruitt, and Bullock. Hunter's testimony is confirmed by the Employer's Daily Time Record for June 3 (Employer Exhibit 2), which shows that Taylor, Wyrick, Pruitt, and Bullock each worked 12 and ½ hours that day. In testifying about his last visit to the Pearson's Corner jobsite, though, Muttik explained that he told the crewmembers in the pickup truck that, when they came back from lunch, he would be "over there talking to Dennis Bush and Kevin Bullock," and that he then spoke with Bush and Bullock. Significantly, this aspect of Muttik's testimony was not specifically elicited by counsel, but simply came out as Muttik was testifying about the time of day he visited the jobsite. In any event, the point is that, according to Hunter's testimony and the Employer's own time records, employee Bush did not work at the Pearson's Corner jobsite on June 3, and I so find. In turn, I find that this fact tends to support Muttik's testimony that his last visit to the jobsite simply did not occur on June 3.

Moreover, I find that Muttik's testimony is corroborated by employee Bullock's testimony, which I credit, that neither Organizer Fridell nor Muttik visited the Pearson's Corner site on June 3. Admittedly, Bullock's post-election conversations with Hunter suggest that Bullock initially was uncertain about when Muttik last visited the jobsite. In considering Bullock's testimony about these conversations, however, I find nothing suspicious in Bullock's initial response to Hunter that he thought Muttik's last visit was the day before the election and his subsequent correction that it must have been the week prior to the election. Notably, it was the Employer, not the Petitioner, who spurred Bullock's attempts to recall Muttik's last visit to the jobsite. Also, I find it significant that Bullock's correction was not made at the hearing but, according to his uncontradicted testimony, within days of his initial conversation with Hunter.

Finally, in crediting Organizer Muttik's testimony that he did not visit the Pearson's Corner jobsite on June 3, I do not mean to suggest that General Foreman Hunter gave untruthful testimony. Indeed, it struck me that Hunter was trying to give his best recollection of the events in question. As counsel for the Petitioner brought out on cross-examination, though, Hunter was mistaken about Organizer Fridell visiting the Pearson's Corner jobsite, notwithstanding that he previously believed that to be the case. Similarly, I find that Hunter more likely than not was mistaken about when Muttik last visited the Pearson's Corner jobsite.

The second alleged pro-union meeting on June 3 occurred at the Rehobeth Beach jobsite, which covered about 40 utility poles running alongside a stretch of U.S. Route 1 in Rehobeth Beach. In this instance, there is no dispute that Organizer Fridell actually visited the Rehobeth Beach jobsite on June 3 and that he spoke to several crewmembers at the site. Supervisor Mark A. Nauman explained that he was the project manager overseeing the work at the Rehobeth Beach site and that he had about 10 men working along Route 1. Several employees were located in front of a restaurant called Jimmy Lin's. This group included Scott Mordes, who was the crew foreman, and employees Michael Berley, Martin Taylor, John Granger, and Tony Johnson. According to Nauman, he stopped by Jimmy Lin's at about 10:30 a.m. to check on the crew's progress. As Nauman arrived, he saw Organizer Fridell talking with several employees, including Crew Foreman Mordes. Nauman further testified that, after less than a minute, he saw that Fridell had finished speaking with the employees. Nauman admitted that he did not hear any of the conversation and that he had no idea what Fridell and the employees discussed. Nauman later asked Crew Foreman Mordes what it was about, but Mordes would not tell him.

Crew Foreman Mordes and Organizer Fridell both testified about their discussion at the Rehobeth Beach jobsite on June 3, and both largely corroborated Supervisor Nauman's

testimony. Thus, Crew Foreman Mordes agreed that Organizer Fridell visited him at the jobsite at about 10:30 a.m. on June 3, that Fridell spoke to him for about five minutes, and that a couple of other employees were present for part of the conversation. Organizer Fridell too substantially corroborated this description of their meeting.

Unlike Supervisor Nauman, though, Crew Foreman Mordes and Organizer Fridell were able to, and did, recount the substance of their brief conversation. Mordes testified that the Petitioner previously had asked him to serve as an observer at the June 4 election and that Organizer Fridell was simply going over what that involved, including for example, that Mordes had to arrive at the polling place at 5 a.m. on June 4 for the pre-election conference.⁶ Mordes specifically testified that Organizer Fridell did not say anything about how people should vote in the election. Mordes explained that there was no need for Fridell to ask for votes because his crew's position on the Union was well known. Organizer Fridell confirmed that the reason he stopped by the Rehobeth Beach jobsite was to make sure that Crew Foreman Mordes knew he had to arrive at the polling place at 5 a.m., not at 5:30 a.m. when the polls opened. Further, Fridell testified, in agreement with Mordes, that their brief conversation concerned only Mordes' role as the election observer.

As the above recitation of the relevant testimony makes clear, there is no material dispute about Fridell's brief meeting with Mordes on June 3. Based on the testimony of Supervisor Nauman, Crew Foreman Mordes, and Organizer Fridell, I find that Fridell met with Mordes at the Rehobeth Beach jobsite on the morning of June 3 for about five minutes, and that their conversation concerned only Mordes' role as an election observer for the Petitioner. In making these findings, I have credited all three witnesses, each of whom gave clear and concise

⁶ The hours of the election were from 5:30 a.m. through 7:30 a.m.

testimony about the events of June 3 at the Rehobeth Beach jobsite. In particular, I credit Crew Foreman Mordes' testimony, which was fully corroborated by Organizer Fridell, that their brief discussion involved only Mordes' duties as an election observer, and that Fridell did not say anything about how people should vote in the election.

B. The Alleged Use of a Bullhorn and Shouting on Election Day

The Employer alleges in Objection 1 that, during the election on June 4, the Petitioner used an electrically-amplified bullhorn to broadcast pro-union messages to voters arriving at, and inside, the polling place, and that the Petitioner also shouted pro-union messages to the voters.

1. The polling place

Objection 1 requires a description of the polling place. The following description of the polling place is based on undisputed testimonial and documentary evidence, and I find that it fairly describes the polling place. The actual voting area was located inside a warehouse building, designated Warehouse 1, at the Employer's facility in Milton, DE. Warehouse 1 was not a working area. The layout of the facility is depicted in Employer Exhibit 1, which is attached to this Report as Appendix 1. As shown in Employer Exhibit 1, the facility abuts U.S. Route 1 to the west and Primehook Road to the north. As explained by several witnesses, access to the facility may be gained only by means of a driveway that intersects with Primehook Road and runs north to south from Primehook Road. Thus, all the voters who drove to the facility on June 4 turned into the facility at the intersection of Primehook Road and the Employer's driveway.

Warehouse 1 is located immediately to the east of the driveway. The warehouse is rectangular in shape, being approximately 57 feet wide by 235 feet long, with its length running north to south from Primehook Road and parallel to the driveway. The warehouse is constructed

of concrete block and has a wood frame roof. It has a garage door on its north side, a second garage door on its south side, and a regular entry door on its south side. The warehouse has no windows. The north side of Warehouse 1 is set back from Primehook Road, such that the south end of the warehouse is approximately 340 feet from the north side of Primehook Road.

Regional Manager Eugene J. Nichols, Sr. placed the actual voting area at approximately 30 to 35 feet from the entry door on the south side of the warehouse. Thus, the voting area was approximately 305 to 310 feet from the north side of Primehook Road.

On the west side of the driveway is an employee parking area. The parking area too is rectangular in shape (approximate dimensions unknown) and, like Warehouse 1, its length runs north to south from Primehook Road and parallel to the driveway. From the driveway, there are two points of access to the parking area, one in the northeast corner of the parking area and one in the southeast corner. Also, the driveway leads to an additional parking area on the south side of Warehouse 1.

2. The bullhorn and the shouting

At about 5:10 a.m. on June 4, the parties met at the polling area with the Board Agent for the pre-election conference. Regional Manager Nichols attended the conference for the Employer. Organizer Fridell attended the conference for the Petitioner. The conference concluded at approximately 5:25 a.m. Nichols then left the polling area to drive off-site to have breakfast during the voting hours. Nichols testified that, as he was pulling out of the driveway onto Primehook Road, he saw Fridell standing next to a vehicle parked along the north side of Primehook Road, directly across from the entrance to the driveway. Based on Employer Exhibit 1, and several witnesses' testimony, it appears that Fridell was standing at a point that was approximately 50 to 60 feet from the north end of the employee parking lot and approximately

305 to 310 feet from the actual voting area inside Warehouse 1. In any event, Nichols testified that he saw Fridell holding a bullhorn at his side, but that he did not see Fridell use the bullhorn at the time. Nichols then drove away to breakfast. I credit Nichols' testimony to this point.

Significantly, Nichols' testimony was substantially corroborated by Organizer Fridell's own testimony, which I credit, that, just after the conclusion of the pre-election conference, he parked his car along the north side of Primehook Road in the area of the entrance to the driveway, and that he removed some signs and a bullhorn from his trunk. Fridell testified that, as Nichols' drove by, Nichols' motioned to the bullhorn and asked, "You planning on using that?" Fridell responded, "No, it's 5:00 in the morning." Fridell further testified that the bullhorn was in his trunk from a previous campaign and that he simply placed it on the roof of his car. I credit this testimony, as well, inasmuch as it was consistent with Nichols' account to this point.

So, shortly after 5:30 a.m., Regional Manager Nichols had left the area, Organizer Fridell was standing, alone, along the north side of Primehook Road with a bullhorn sitting on the roof of his car, and the polls were open. Organizer Fridell testified that, as he was standing there, employees began arriving to vote and that, after voting, employees, individually and in small groups, periodically came over to ask him "what's next?" and whether they would be counting the votes that day. Fridell further testified that, by about 6:30 a.m., quite a few employees were stopping by to speak to him. Around this time, Fridell decided to call Organizer Muttik, who was stationed at the intersection of Route 1 and Primehook Road, and asked Muttik to come down and talk to some of the employees. Muttik testified that he in fact joined Fridell at his location along Primehook Road around 6:30 a.m. At about the same time, three members of Local 126 also joined Fridell and Muttik at the same location. I credit Fridell's and Muttik's testimony to this point.

Organizer Fridell admitted that there were conversations with employees as they were arriving to vote. As Fridell described it, "Most guys stopped and talked to us before they pulled in, but generally it was just like, hey, thumbs up, 'Today's your day,' you know . . . it was mostly answering them as they pulled in." Fridell further testified that it was possible he also used phrases similar to "Today's your day." He also admitted, on cross-examination, that he could not rule out the possibility that one of the Local 126 members present might have yelled "vote yes" at some point. Still on cross-examination, Organizer Fridell added that he did recall several employees yell, "vote yes," to other employees in the area of the parking lot.

The crux of the dispute, though, lies in Organizer Fridell's testimony that he did not use the bullhorn at any time during the voting hours. Fridell further testified that, to his knowledge, no one else used the bullhorn, and that he did not see anyone with a different bullhorn. He claimed that the bullhorn he took out of his trunk remained on the roof of his car during the voting hours. Fridell admitted that, after the polls closed and the votes had been counted, he used the bullhorn once as he was packing up his car, but that he only said, "Here's Danny," as he saw Local 126 Organizer Dan Shadler, who had been stationed at Route 1 and Primehook Road, arriving to see about the outcome of the election. But, again, Fridell denied using the bullhorn at any time during the voting hours. Organizer Muttik corroborated this denial. Muttik testified that, after he joined Fridell, he saw the bullhorn on the roof of Fridell's car but that he did not see Fridell, or anyone, use it during the voting hours.

The Employer of course maintains that someone from the Union did use the bullhorn during the voting hours to broadcast pro-union messages to the employees as they arrived at the polling place, and that the messages could be heard inside Warehouse 1 near the voting area. To

substantiate these claims, the Employer called a series of witnesses to testify about what they saw and heard at the polling place on June 4. The pertinent testimony was as follows.

Employee Kevin Bullock testified that, on June 4, he arrived at the Employer's facility at about 6:15 or 6:20 a.m. Employee Dennis Bush was with him. Bullock testified that he neither saw nor heard a bullhorn, or anyone shouting, from the time he arrived at the facility to the time he entered Warehouse 1 to vote. Bullock further testified that he voted and exited Warehouse 1 at about 6:30 to 6:45 a.m., and that at this time he did hear someone repeatedly shouting over a bullhorn, "voice with a vote." Bullock, however, was unable to see who was using the bullhorn. Also, Bullock testified that he was on-the-clock at the time he voted, a fact confirmed by the Employer's Daily Time Record for June 4 (Employer Exhibit 4), which shows that Bullock was on paid time from 6 a.m. to 9 a.m.⁷

Employee Donald P. Hamilton testified that, on June 4, he arrived at the employee parking lot at about 6:45 a.m. and that he entered Warehouse 1 to vote at about 6:50 a.m. Hamilton testified that, as he pulled into the driveway from Primehook Road, he saw about 3 or 4 people standing along Primehook Road, opposite the driveway, and that he saw one of them with a bullhorn, though he was unable to identify the person. He did not, however, hear anything coming from the bullhorn. Hamilton testified that he parked his car in the employee parking lot in an area about 50 to 60 feet from where Organizer Fridell and the other union representatives were standing. Hamilton testified that, as he exited his car, he heard someone say, loudly, "vote yes," one time. Hamilton did not see who made this statement, but he was confident that it came from the direction of the union representatives' location. Hamilton added that he met up with employee Robert A. Warren III in the parking lot and that they walked into Warehouse 1

⁷ Employer Exhibit 4 shows that employees Ronnie Wyrick, David Pruitt, and Dennis Bush also were on paid time from 6 a.m. to 9 a.m. on June 4.

together. Hamilton further testified that he did not hear any bullhorns or shouting while he was inside Warehouse 1.

Employee Robert A. Warren III testified that, on June 4, he arrived at the facility at about 6:45 to 6:50 a.m., and that, as he turned into the driveway, he saw a group of 4 to 5 people standing along Primehook Road across from the driveway and that someone in the group was holding a bullhorn. Warren testified that he parked his car, and that, as he was heading toward the south-side entry door to Warehouse 1, he heard the words, "Yes, vote yes, do the right thing." Warren testified that the words appeared to be emanating from the bullhorn.

Employee Richard Bender testified that, on June 4, he arrived at the facility at about 6:45 a.m. He testified that, as he turned into the driveway from Primehook Road, he saw someone in the area of the union representatives holding a bullhorn, though he could not identify the person. Bender further testified that, from the time he arrived at the facility to the time he voted and left the facility, he did not hear any words coming from the bullhorn. Nor did he hear anyone shouting anything. Although the Employer called Bender as its witness, the Employer introduced into evidence Bender's affidavit (Employer Exhibit 6), in which Bender asserted that, when he arrived at the facility on June 4, he saw someone standing along Primehook Road, opposite the driveway entrance, holding a bullhorn to their mouth and stating, loudly and repeatedly, "vote yes." Upon being confronted with this portion of his affidavit, Bender testified that, while he was telling the truth at the time he signed the affidavit, he had thought about it some more and now did not think he actually heard anything over the bullhorn.

Employee Robert A. Warren, Jr. testified that he arrived at the facility on June 4 at about 6:30 a.m. Warren testified that, as he pulled into the driveway, he saw 3 or 4 people standing near a car parked along Primehook Road and that one of them was holding a bullhorn, though he

could not identify the person. He further testified that he parked his car and that, as he was walking toward Warehouse 1, he heard, "Think for yourself and vote yes." Warren testified that he heard the phrase emanating from the bullhorn and that he heard it more than once, though he was unsure how many times.

Employee Andrew T. Hamilton testified that he arrived at the facility at about 6:20 a.m. on June 4. He testified that, as he turned into the driveway from Primehook Road, he saw a group of 3 to 5 people standing along Primehook Road near the entrance to the driveway and that he heard two individuals from the group shout, in unison, "do the right thing, vote yes," one time. Hamilton testified that he did not hear any additional shouting while he parked his car. Further, Hamilton testified that he did not hear any shouting while he was inside Warehouse 1, although he claimed he heard some unintelligible echoing or mumbling inside Warehouse 1.

Employee Scott Mordes, who, again, was an election observer for the Petitioner, testified that he voted at about 5:30 a.m. when the polls opened. He testified that it was very quiet inside Warehouse 1 and that he did not hear a bullhorn or any shouting.

Finally, in addition to the testimony described above, Regional Manager Nichols testified that, after breakfast on June 4, he returned to the facility at approximately 7:15 a.m. He testified that, as he approached the driveway entrance, he saw Organizer Fridell with a bullhorn and heard him state, through the bullhorn, "vote yes," one time.

Having carefully considered all of the above testimony, I find that the Petitioner, whether it was Fridell, Muttik, or one of the Local 126 members who joined them around 6:30 a.m., used a bullhorn during the voting hours on June 4 to communicate messages, specifically, "vote yes," "voice with a vote," and "do the right thing," to eligible voters. I further find that, during the voting hours on June 4, the Petitioner, again, whether it was Fridell, Muttik, or one of the Local

126 members, shouted the same or similar messages to eligible voters. I do not find, however, that any such messages, whether broadcast over the bullhorn or shouted, were audible inside Warehouse 1 during the voting hours.⁸ I have made these findings for the following reasons.

The weight of the testimony convinces me that the Petitioner used the bullhorn and shouted to broadcast the above messages to employees just prior to casting their votes in the election. Specifically, I credit the testimony of employees Bullock, Warren III, Warren, Jr., Donald P. Hamilton, and Andrew T. Hamilton. They each gave straightforward testimony about what they saw and did not see and about what they heard and did not hear. In particular, I again was impressed by Bullock's testimony. He was confident in his answers, even when confronted with a discrepancy between his testimony and his prior affidavit. As described above, Bullock testified that, after he voted and exited Warehouse 1, he heard someone with the bullhorn shout, loudly and repeatedly, "voice with a vote." Bullock's affidavit, though, indicated that this occurred before he voted. Bullock confidently explained that he definitely heard the bullhorn and that it was after he voted. In the end, I was convinced that his testimony was accurate.

In contrast, I was wholly unconvinced by Bender's retraction of that portion of his affidavit in which he had declared that he saw someone in Fridell's group holding a bullhorn to their mouth and stating, loudly and repeatedly, "vote yes." On the stand, Bender weakly explained this significant reversal as follows: "Well, I thought I had [heard the bullhorn] but, you know, thinking back, I don't think I did." I was not persuaded by this explanation and I have little trouble finding that Bender's affidavit contained his true recollection of the events.

⁸ There were some questions and testimony about how the bullhorn actually functioned to augment a user's voice. Although the mechanics of the bullhorn were never really explained, I find that the bullhorn was not electrically amplified by an external power source, inasmuch as Regional Manager Nichols and Organizer Fridell agreed that the bullhorn in question was not connected to any such source. At the same time, though, Fridell admitted that the bullhorn amplifies the user's voice, and I so find.

The Petitioner in its closing argument made the point that none of the witnesses testified, specifically, that they saw Organizer Fridell, Organizer Muttik, or any of the Local 126 members use the bullhorn. Substantial circumstantial and testimonial evidence in the record, however, convinces me that Fridell, Muttik, and/or the Local 126 members were the individuals using the bullhorn. To begin, there is no dispute that Fridell brought the bullhorn to the facility on June 4, that--although he disclaimed any plan to use it on June 4--he did not stow it away in his trunk, that he knew how to use it, and that he actually used the bullhorn on June 4 at least once at the conclusion of the voting hours.⁹ Moreover, Fridell testified that he did not see any other bullhorns at the facility that day.

It is true that no employee specifically identified the person they saw using the bullhorn, but the employees' descriptions of the scene strongly suggest that it was someone in Fridell's group using the bullhorn. Employee Robert A. Warren, for example, testified that, as he arrived at the facility, he saw a group of 4 to 5 people standing along Primehook Road across from the driveway and that someone in the group was holding a bullhorn. He then parked his car and heard the words, "Yes, vote yes, do the right thing," emanating from the bullhorn. Similarly, employee Robert A. Warren, Jr. testified that, as he pulled into the driveway, he saw 3 or 4 people standing near a car parked along Primehook Road and that one of them was holding a bullhorn. He parked his car and, as he was walking toward Warehouse 1, he heard, "Think for yourself and vote yes," coming from the bullhorn. Employee Donald P. Hamilton, too, saw the bullhorn among a group of 3 to 4 people standing along Primehook Road across from the driveway entrance--precisely where the union representatives were standing. In the end, I am

⁹ I find it unnecessary to resolve whether Fridell said, "Here's Danny," as he claimed, or, "Vote Yes," as Regional Manager Nichols claimed.

convinced that Organizer Fridell, Organizer Muttik, and/or the Local 126 members used the bullhorn on June 4.

As far as shouting, I find it significant that Organizer Fridell admitted that he, Muttik, and the Local 126 members were trying to offer encouraging words to some employees as they arrived at the facility. The employees, of course, were arriving in motor vehicles, and they were parking in an area across Primehook Road that was at least 50 to 60 feet away from where Fridell, Muttik, and the Local 126 members were located. Some of the employees may have stopped at their location, but some turned immediately into the driveway and entered the employee parking area. In these circumstances, I find it more likely than not that Fridell, Muttik, and the Local 126 members had to shout just to be heard by these employees. And, indeed, Fridell admitted that he could not rule out the possibility that a Local 126 member might have yelled, "vote yes," to some of the arriving employees.¹⁰

At the same time, as stated, I do not find that anything the Petitioner broadcast over the bullhorn or shouted was audible inside Warehouse 1 near the voting area at any time during the voting hours.¹¹ The only witness who testified to hearing something while inside Warehouse 1 was employee Hamilton. He testified that he heard some unintelligible echoing or mumbling while he was inside the warehouse near the voting area. Just as a matter of logic, I find it highly improbable that what Hamilton heard came from where Fridell, Muttik, and the Local 126 members were standing along the north side of Primehook Road. As described above, they were stationed approximately 305 to 310 feet away from the voting area inside Warehouse 1, which

¹⁰ I credit Organizer Fridell's testimony that he saw employees in the parking area shouting, as well, but I do not accept his suggestion that the employees alone were responsible for any shouting.

¹¹ I find it unnecessary to decide whether the bullhorn or shouting was audible anywhere else in Warehouse 1 inasmuch as it is undisputed that the warehouse was not a working area.

was constructed of cement block. Plus, Warehouse 1 did not have any windows and had only three doors, two of which were located on the south side of the warehouse--facing away from the union representatives' location. Finally, I note the lack of any additional testimony to bolster Hamilton's testimony.

IV. LEGAL ANALYSIS

As the objecting party, the Employer has the burden of providing sufficient evidence to substantiate its objections. Builders Insulation, Inc., 338 NLRB No. 108 (2003).

A. The Pre-election Union Meetings

The Petitioner's alleged June 3 meetings with eligible voters requires application of the Board's longstanding Peerless Plywood rule.¹² The rule prohibits employers and unions from "making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." 107 NLRB at 429. I find that the Employer has failed to substantiate its claim that the Petitioner violated the rule in this case. Accordingly, I shall recommend that the Board overrule Objection 2 in its entirety.

As described, the Employer alleges that the Petitioner conducted two pro-union electioneering meetings with voters within 24 hours of the election--one involving Organizer Muttik at a jobsite in Pearson's Corner, Delaware, and a second meeting involving Organizer Fridell at a jobsite in Rehobeth Beach, Delaware. With respect to the Pearson's Corner jobsite, however, I have found that Organizer Muttik simply did not meet with employees at the site on June 3. That being the case, there could not have been a violation of the Peerless Plywood rule.

In any event, even assuming that Organizer Muttik's last meeting with employees at the Pearson's Corner jobsite occurred on June 3, I still would not find a Peerless Plywood violation

¹² 107 NLRB 427 (1953).

because the Employer failed to establish that the meeting involved an impermissible "election speech." Recently, the Board made clear that any partisan campaign speech, even a "dry recitation encouraging support for a particular electoral choice," could potentially violate the Peerless Plywood rule. Purolite, 330 NLRB 37, 40 (1999). In this instance, though, all the Employer presented was General Foreman Hunter's hearsay testimony that employee Bullock later told Hunter the alleged June 3 meeting with Muttik was a "union meeting." Even assuming that it was a "union meeting," it is entirely possible that the meeting could have been limited to a simple reminder to employees to vote in the election without any partisan appeals by Organizer Muttik. The Employer failed to establish that the alleged meeting involved the latter.¹³

I find that Organizer Fridell's brief June 3 meeting with Crew Foreman Mordes at the Rehobeth Beach was unobjectionable for similar reasons. As described, I have found that Fridell met with Mordes at the Rehobeth Beach jobsite on the morning of June 3 for about five minutes, and that their conversation concerned only Mordes' role as an election observer for the Petitioner. Thus, their meeting did not involve any "election speech" covered by the Peerless Plywood rule.

For these reasons, I find that the Employer has failed to substantiate the allegations made in Objection 2 and I shall recommend that the Board overrule Objection 2 in its entirety.

B. The Use of a Bullhorn and Shouting on Election Day

The Petitioner's use of a bullhorn and shouting to communicate with employees as they arrived at the Employer's facility to vote on June 4 implicates the Board's decisions in Purolite, 330 NLRB 37 (1999), on remand from NLRB v. Bro-tech Corp., 105 F.3d 890 (3d Cir. 1999), and Alliance Ware, Inc., 92 NLRB 55 (1950). Applying these decisions, I find that the Petitioner

¹³ Notably, after I advised the Employer that Hunter's recitation of Bullock's statement appeared to constitute hearsay, the Employer called Bullock as a witness but never asked him about the substance of his last meeting with Muttik at the Pearson's Corner jobsite.

engaged in objectionable conduct and that this conduct interfered with the June 4 election. I therefore shall recommend that the Board set aside the election and direct a second election.

In Purolite, the Board set aside an election based on the following conduct. On the day of the election, the union parked a sound truck across a street from the employer's facility and, for 9-1/2 hours covering both voting and non-voting hours, broadcast tape-recorded pro-union songs, as well as popular music unrelated to unions. The songs were audible in various locations inside the employer's facility, but not in the polling area itself. Applying the Peerless Plywood rule, the Board found that the union's broadcasting of the songs was objectionable and warranted setting aside the election.

The Board in Purolite began with the basic objective of the Peerless Plywood rule; that is, "to keep voters as free of uninvited mass messages as possible during the period just prior to the conduct of the election." 330 NLRB at 39. Turning to the facts, the Board emphasized that the pro-union songs were broadcast throughout the day of the election and were audible to employees as they were working and as they were arriving at the facility. Given these facts, the Board explained its application of Peerless Plywood as follows:

This was not an effort by a party to engage in voluntary discussions with employees about the merits of union representation. Instead, just prior to casting their votes, these employees--whether on their way in to work, on the job, and/or while leaving the plant--were exposed to the Union's campaign broadcast whether they wished to hear it or not.

330 NLRB at 40. The Board concluded that the employees thus became a "captive audience within the meaning of *Peerless Plywood*." Id. Further, although there was some debate about whether the songs actually constituted campaign speech, the Board found that they did, declaring, "Whether in the form of lyrics to a pro-Teamsters song, a nonmusical partisan oration,

or a dry recitation encouraging support for a particular electoral choice, we find that they all fall within the broad rubric of campaign speech within the proscription of *Peerless Plywood*."

Similarly, in Alliance Ware, which actually predated Peerless Plywood, the Board set aside an election where, during both voting and non-voting hours, the union broadcast electioneering material from a sound truck parked across a public street from the employer's parking lot. The sound truck was located approximately 310 feet from the employees' entrance to the plant and the actual polling area was located approximately 30 feet inside the entrance. There was no evidence that the employees could hear the union's broadcasts while at the polling area inside the plant, but the evidence established that the broadcasts were clearly audible to the employees as they walked toward the entrance to the plant. In these circumstances, the Board concluded that union's conduct constituted impermissible "electioneering near the polling place" and warranted setting aside the election.

In the present case, I find that the Petitioner's conduct during the June 4 election was materially indistinguishable from the conduct found objectionable in Purolite and Alliance Ware. Instead of a sound truck, the Petitioner used a bullhorn, and shouting, to broadcast pro-union messages (dry recitations though they may have been) to employees as they were arriving at the polling place to cast their vote in the election. Again, it is undisputed that there was only one route by which employees could reach the polling area. They had to drive along Primehook Road, turn into the driveway--immediately across from where Organizers Fridell and Muttik and the Local 126 members were stationed--and traverse the parking lot to the south end of Warehouse 1. Thus, as in Purolite and Alliance Ware the employees--some as they were pulling into the driveway from Primehook Road, some as they were walking across the parking lot, and some as they were leaving the facility--were subjected to the Petitioner's partisan messages

whether they wished to hear them or not. Whether labeled a "captive audience" speech or impermissible "electioneering," I find that the Petitioner's conduct was objectionable and interfered with the conduct of the election.

Accordingly, I shall recommend that the Board sustain Objection 1 and set aside the election.

V. RECOMMENDATION

I recommend that the Employer's Objection 1 be sustained and that its Objection 2 be overruled in its entirety. Based on this Objection, I conclude that the Union engaged in objectionable conduct sufficient to warrant setting aside the election. Accordingly, I recommend that the June 4, 2003, election be set aside and that a second election be conducted.

Under the provisions of Secs. 102.69 and 102.67 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington, DC, by August 1, 2003. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy on the other party and file a copy with the Regional Director for Region 5.

Dated at Baltimore, MD, this 18th day of July 2003.

Andrew J. Krafts, Hearing Officer
National Labor Relations Board, Region 5
103 South Gay Street, 8th Floor
Baltimore, Maryland 21202